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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 543

W. C. WALLACE, D/B/A WALLACE NOVELTY COMPANY,
Petitioner,

vs.

THE CITY OF CARTERSVILLE, SAM McGOWAN, AS THE MAYOR OF THE CITY OF CARTERSVILLE, J. V. BISHOP, WARREN AKIN, SAM SMITH, AND H. H. GREENE, AS THE BOARD OF ALDERMEN OF THE CITY OF CARTERSVILLE, AND E. J. AUCHMUTEY, AS CHIEF OF POLICE OF THE CITY OF CARTERSVILLE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner herein, W. C. Wallace, by and through his counsel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above cause on the 15th day of October, 1947, affirming a judgment of the Superior Court of Bartow County, Georgia.

Judgment Below

The judgment of the Supreme Court of Georgia was entered in said cause on October 15, 1947, as shown by page 46 of the transcript of the record, and a motion for rehear

ing in said case was denied on November 14, 1947, as shown by page 49 of the transcript of the record. At the time of preparation of this petition this case had not been reported in any reporter system.

Jurisdiction

The judgment of the Supreme Court of Georgia entered in said cause on October 15, 1947, and a rehearing denied on November 14, 1947, was a final termination in the highest court of the State of Georgia in which a decision could be had of a cause where a right, privilege and immunity was specially set up and claimed by petitioner under the Constitution of the United States; the particular right, privilege and immunity claimed by petitioner being that he should not be deprived of his property without due process of law. The jurisdiction of this Court, therefore, rests on Section 237 of the Judicial Code, as amended (28 U. S. C. A. 344-B), the material portion of which is as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution of the United States."

Question Presented

1. Is a person deprived of his property without due process of law as guaranteed under Section 1 of the 14th Amendment to the Constitution of the United States, where a municipal corporation enacts an ordinance prohibiting the maintaining or operation of "pin-ball" machines which are used solely for the pleasure of the operator and which in

no way involves a gambling transaction and where the operator receives no prize or any other thing of value whatsoever, and where the operation of such machines is for the sole purpose of demonstrating the skill of the operator; whereby the ordinance in question declares such machines to be a nuisance, and subject to abatement by said municipal corporation by and through its constituted authorities; and where no provision is made under the ordinance for notice and hearing before such machines shall be abated as a nuisance.

Specification of Errors

Petitioner contends that the Supreme Court of Georgia erred:

1. In affirming the judgment of the trial Court in holding that the petition did not set out a cause of action for equitable relief by way of injunction.

2. In holding that the ordinance in question did not deprive a person of property without due process of law; and in holding that said ordinance did not violate section one of the 14th Amendment to the Constitution of the United States.

Summary Statement of Matter Involved

On the 10th day of February, 1947, the Mayor and Board of Aldermen of the City of Cartersville, enacted a City ordinance the pertinent parts of which are as follows:

> "From and after the 15th day of February, 1947, it shall be unlawful for any person, firm or corporation, whether the owner or not of the machines hereinafter named, to maintain or operate within the corporate limits of the City of Cartersville, in Bartow County, Georgia, any "pin-ball" machine or similar machine, including all machines operated by depositing a coin therein for the playing of a game or the engaging in of any contest of chance or skill. Provided, that the

provisions of this ordinance shall not apply to machines owned and operated exclusively for the sale of merchandise, where neither the element of chance or skill is involved. The operation and maintenance of the machines prohibited in this ordinance, being conducive to disorder and encouraging to gaming, and a threat and menace to the peace and morals of the community, the same is hereby declared to be a nuisance, subject to abatement and prohibition by said city by and through its constituted authorities."

On the 14th day of March, 1947, and after the effective date of said ordinance, a petition for equitable relief in this cause was filed in the Superior Court of Bartow County, in which petition it was alleged by petitioner that the Chief of Police of the City of Cartersville was threatening confiscation and destruction of certain property belonging to petitioner, to-wit: "pin-ball" machines located in the City of Cartersville; and that said machines were used for amusement only and that the users of such machines received no prizes or any thing of value, that they were not used as gambling devices and were operated solely and exclusively for the pleasure of the users; and further alleged that said ordinance was null and void because it contravened the Constitution of the United States which guaranteed that no person would be deprived of property without due process of law.

The trial Court in the cause where said municipal corporation is located dismissed said petition upon ground one of a general demurrer, ground one of the demurrer being as follows:

1. The petition does not set forth a cause of action.

The Supreme Court of the State of Georgia on the 15th day of October, 1947, affirmed the lower Court and filed its written opinion holding that the ordinance was constitutional and that it did not violate the 14th Amendment to

the Constitution of the United States, and therefore did not deprive petitioner of his property without due process of law.

Reason Relied On for the Allowance of Writ and Brief in Support of Petition

It is the contention of petitioner for certiorari that the ordinance of the City of Cartersville in question operated to deprive petitioner of his property without due process of law. The ordinance, in addition to providing for penal enforcement, provided that his property, "pin-ball" machines, were declared by the ordinance to be a nuisance, and subject to abatement by the constituted authorities of the City. Assuming that this contention is correct we respectfully submit that the refusal of the highest Court in Georgia for equitable relief is subject to review by the Supreme Court of the United States.

The United States District Court and the United States Court of Appeals, in the case of *Mills Novelty Company* v. *Farrell,* 3 F. Supp. 555, 64 F. 2nd 476, held that:

> "Seizure by police officers of automatic vending machines which do not constitute gambling devices deprived owners of property without due process of law, and was violative of the privileges and immunities clause of the Constitution of the United States."

The Court of Civil Appeals for the State of Texas, in the case of *Sheppard* v. *Giebel,* Texas Civil App. 110 S. W. 2nd 116, held that:

> "Provision of act levying occupation tax upon coin operated vending machines authorizing comptroller to destroy such property summarily for nonpayment of tax and without a hearing, was unconstitutional as in contravention of Section one of the 14th Amendment to the United States Constitution, since such machines were not nuisances per se."

The code of Georgia of 1933, in providing for abatement of nuisances in municipalities by Section 72-402, provides that reasonable notice shall be given to the parties interested, of the time and place of hearing to determine the question of abatement.

The ordinance in question did not make provision for any kind of hearing or notice to the parties interested.

The Supreme Court of Georgia, in a unanimous decision in the case of *Western and Atlantic Railroad Company, et al.* v. *City of Atlanta, et al.*, 113 Georgia, 537, held as follows:

> "Save and except as to those things which are by the common or statute law declared to be nuisances per se, or which are in their very nature palpably and indisputably such, neither the municipal authorities of any city of this State, nor any department thereof which has been given the power to abate nuisances, has the legal right summarily to compel the abatement of a particular thing or act as a nuisance, without reasonable notice, to the person alleged to be maintaining or doing the same, of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance."

The Court of Appeals of Georgia in the case of *Williams* v. *The State*, 65 Ga. App., 843, held as follows:

> "The evidence failed to show that the machines would automatically or otherwise pay a prize, or that a prize was being given in connection with their operation. To constitute gaming under the statute three elements are essential: (1) a consideration, (2) a chance, and (3) a prize. Barker *v.* State, 56 Ga. App. 705 (193 S. E. 605). In the instant case the proof failed to show the presence of the third element, and failed to show that the machine or device in this case was, per se, a gambling device such as is commonly known as a gambling coin-in-the-slot machine, which automatically and per chance pays off in coins or other things of

value. Under the statute now under consideration it is unlawful to maintain, keep, employ and carry on a ball machine, or other device operated similarly to such described slot machines. But the evidence in the instant case was insufficient to so classify the device here involved."

We respectfully submit that since "pin-ball" machines have been held by the Courts of Georgia to be lawful and legitimate property, and that since no notice was provided for in the ordinance in question, as required by the Code of Georgia, that an attempt or threat to confiscate and destroy such property would be the subject matter of injunction and equitable relief, as being in contravention to the rights guaranteed under Section one of the 14th Amendment to the Constitution of the United States, which guarantees that no person shall be deprived of property without due process of law.

Respectfully submitted,

JEFFERSON L. DAVIS,
Counsel for Petitioner.

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